

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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Estate of MARCELLA M. S. CARTER.

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JAY HOWARD BRODY, Personal Representative  
for the Estate of MARCELLA M. S. CARTER  
a/k/a MARCELLA JASPER, MARY SANCHEZ,  
Guardian, WILLIAM J. JASPER, RANDAL K.  
JASPER, and ROBERT A. JASPER,

Plaintiffs-Appellees,

v

ERIC GRANITUR,

Defendant-Appellant

and

SETTLEMENT FUNDING, LLC,

Defendant.

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Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant, Eric Granitur, appeals as of right from a judgment awarding damages to plaintiffs that was entered after the trial court denied his motion to set aside a default judgment entered in plaintiffs' favor. We reverse and remand for further proceedings.

This is a legal malpractice and "intentional interference with an inheritance" case. In 1991, plaintiffs' decedent, Marcella Carter, settled a wrongful death action regarding her husband which included the payment of a monthly annuity for twenty years. On April 10, 2003, Carter entered into a structured settlement transfer agreement with Settlement Funding, LLC to sell a portion of her rights to the annuity payments. Pursuant to the Structured Settlement Protection Act in effect at the time, Carter sought professional advice from defendant, an attorney in Florida, with regard to the transfer agreement. On May 30, 2003, after an extensive

UNPUBLISHED

May 31, 2012

No. 303364

Oakland Circuit Court

LC No. 2007-087993-NM

hearing, the transfer agreement was approved by the lower court, the transaction was completed, and Carter received the compensation set forth in the transfer agreement.

On April 15, 2005, Carter died. On December 14, 2007, this lawsuit was filed against defendant and Settlement Funding, LLC by Carter's (the decedent's) personal representative, the decedent's minor children and the minor children's guardian (plaintiffs). Plaintiffs asserted legal malpractice and "intentional interference with an inheritance" claims against defendant, as well as claims against Settlement Funding, LLC. On January 2, 2008, defendant was served the summons and complaint by mail. On February 14, 2008, after defendant failed to respond, a default was entered. The case proceeded against Settlement Funding, LLC, only. On July 10, 2008, defendant allegedly mailed a motion to dismiss the default premised on a claim of improper service under Florida law, but the motion was not noticed for hearing. Subsequently, on November 12, 2008, the trial court granted Settlement Funding, LLC's motion for summary disposition and the claims against it were dismissed with prejudice. Settlement Funding, LLC is not a party to this appeal.

On November 20, 2008, plaintiffs filed a motion for default judgment. On December 2, 2008, counsel for defendant filed an appearance on his behalf. Defendant then filed a brief in response to plaintiffs' motion for default judgment, arguing that he was entitled to participate in a hearing on the issue of damages. Following oral argument on plaintiffs' motion, the trial court entered an order holding that defendant was entitled to participate in a hearing on damages; thus, plaintiffs' motion for entry of default judgment was denied. On February 8, 2010, an evidentiary hearing limited to the issue of damages was conducted. On April 8, 2010, the trial court issued its opinion and order concluding that plaintiffs' second amended complaint pleaded all of the elements of a legal malpractice claim and an "intentional interference with an inheritance" claim; thus, defendant's liability on these two claims was established as a matter of law by his default. The trial court further held that defendant's conduct was a direct and proximate cause of plaintiffs' injuries, and that plaintiffs were entitled to \$88,718.84 in damages, costs, and interest. A judgment was then entered consistent with the court's order.

On May 6, 2010, defendant filed a motion to set aside the default judgment pursuant to MCR 2.603(D) and MCR 2.612(C)(1)(f). Defendant argued that the default judgment should be set aside because he had good cause for failing to answer the complaint and he could show meritorious defenses to plaintiffs' claims. Defendant argued that he mistakenly believed that he was being represented by counsel for Settlement Funding, LLC, as he had been in the past. Defendant further argued that plaintiffs' legal malpractice claim was barred by the statute of limitations and that "intentional interference with an inheritance" is not a cognizable cause of action. Consequently, defendant argued, manifest injustice would result if the default judgment was not set aside. Plaintiffs opposed the motion.

On March 15, 2011, after a hearing, defendant's motion was denied. The trial court concluded that defendant's claim of good cause was unavailing in light of the factual history of this case. In particular, the court noted that defendant was an attorney and failed to take any affirmative action even after the default was entered against him. Further, because defendant had

filed a motion to dismiss on August 11, 2008—although he failed to schedule a hearing on it—defendant was clearly aware that Settlement Funding, LLC was not defending him in this action.<sup>1</sup> And his purported reliance upon the unsubstantiated past practice of Settlement Funding, LLC, without confirmation of such representation, was inexcusable and unreasonable. Thus, the court concluded, defendant failed to establish good cause for failing to answer plaintiffs’ complaint. The trial court also considered defendant’s purported defenses and concluded that they were not meritorious. In particular, plaintiffs’ legal malpractice claim was not barred by the statute of limitations because MCL 600.5805(10) provides for a three year limitation period to recover damages after death; thus, the claim was timely filed. And defendant waived the defense when he neither asserted it in his first responsive pleading, his motion to dismiss, nor in his subsequent court appearances or filings. Further, the court concluded, manifest injustice would not result if the default judgment was not set aside under the circumstances. This appeal followed.

Defendant argues that the trial court abused its discretion in denying his motion to set aside the default judgment because he established the required good cause and meritorious defenses to plaintiffs’ claims. We disagree.

“The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court.” *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Appellate review is sharply limited where there has been a valid exercise of discretion. *Id.* Accordingly, unless there has been a clear abuse of discretion, the trial court decision must be affirmed. *Id.* An abuse of discretion occurs when the trial court’s decision “falls outside the range of principled outcomes.” *Huntington Nat’l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). Although the law favors resolution of claims on the merits, public policy is generally against setting aside defaults and default judgments that have been properly entered. *Alken-Ziegler, Inc*, 461 Mich at 229; *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008).

MCR 2.603(D)(1) provides that a default or default judgment “shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.” The trial court should consider the totality of the circumstances in determining whether the defaulting party has established good cause and a meritorious defense. *Shawl*, 280 Mich App at 236-237. “Good cause” can be shown by a reasonable excuse for failure to comply with the requirements which created the default. *Id.* at 221 (quotation marks and citations omitted). Factors relevant to determining whether a party has shown good cause include (1) whether the party completely failed to respond or simply missed the deadline, (2) the circumstances behind the failure to file or file timely, and (3) whether the failure was knowing or intentional. *Id.* at 238. A meritorious defense is established by providing an affidavit of facts laying out the defense. *Huntington Nat’l Bank*, 292 Mich App at 392; see, also, MCR 2.603(D)(1).

Here, defendant argues that he established good cause to set aside the default judgment because he had a reasonable excuse for failing to respond to plaintiffs’ complaint. Defendant

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<sup>1</sup> Defendant’s motion to dismiss was dated July 10, 2008, but not entered by the court clerk until August 11, 2008.

claims that Settlement Funding, LLC had handled his defense in the past and he expected that its answer to plaintiffs' complaint would also address the allegations against him. And once the default was entered, defendant was precluded by MCR 2.603(A)(3) from proceeding with the action until the default has been set aside. The trial court concluded that defendant's unsubstantiated excuse was not reasonable. The trial court's decision does not constitute an abuse of discretion.

As the trial court noted, defendant is a licensed attorney in Florida and is aware of both the requirement that a complaint be answered by a certain time either by himself or through counsel, and the potential ramifications for failing to do so. Accordingly, defendant's failure to conclusively determine that Settlement Funding, LLC was going to file an answer on his behalf within the allotted time was unreasonable. An attorney's negligence, particularly when that attorney is a defendant, does not constitute good cause. See *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 96; 666 NW2d 623 (2003); *Park v American Cas Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996). And defendant provided no evidence to support his claim of "past practices" for the trial court's consideration. Further, after receiving the default, defendant did not take any action in its regard until several months later when he filed a motion to dismiss the default that was dated July 10, 2008, for which he failed to request a hearing. After this faulty filing, defendant failed to take affirmative action to have the default set aside so that he could participate in the proceedings that were in progress against Settlement Funding, LLC. Thus, between the date that the default was entered, February 14, 2008, and the date that plaintiffs filed their motion for default judgment, November 20, 2008, defendant made essentially no effort to have the default set aside. And it was not until December 2, 2008, that counsel for defendant filed an appearance on his behalf. Considering the totality of the circumstances, the trial court did not abuse its discretion when it concluded that defendant failed to establish good cause sufficient to set aside the default judgment.

Defendant also argues that, because of the strength of his meritorious defenses, the trial court should have set aside the default judgment. However, there are two requirements that must be established before a motion to set aside the default judgment may be granted. Defendant's argument is premised on a "blurring of the separate inquires of 'good cause' and 'meritorious defense'" that our Supreme Court specifically rejected in *Alken-Ziegler, Inc*, 461 Mich at 229, 233-234. In that case, this Court had affirmed the trial court's conclusion "that the defendant had not alleged a procedural irregularity or defect, and had not given a reasonable explanation for its filing failure," but nevertheless concluded that reversal was required because the defendant had established a meritorious defense. *Id.* at 234. Our Supreme Court reversed our decision, holding that it constituted an improper blurring of the "good cause" and "meritorious defense" requirements of MCL 2.603(D)(1). *Id.* That is, the two requirements are independent inquiries and whether a meritorious defense has been asserted is not to be considered in determining whether the good cause requirement has been established. *Id.* at 232. The Court explained that the "manifest injustice" prong of the "good cause" test "is the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule." *Id.* at 233. Here, defendant has not established that the trial court abused its discretion when it concluded that he failed to satisfy the good cause requirement; thus, we need not consider whether the trial court abused its discretion in concluding that defendant failed to satisfy the meritorious defense requirement of MCR 2.603(D)(1).

Next, defendant argues that the trial court's award of damages was clearly erroneous because the award was speculative, based on an invalid legal theory, and was based on the conclusion that the settlement transfer was invalid. We agree that the trial court's decision requires reversal.

We review a trial court's decision on damages following an evidentiary hearing for clear error. *Woodman v Miesel Sysco Food Serv Co*, 254 Mich App 159, 190; 657 NW2d 122 (2002). A clear error exists when, after reviewing the whole record, this Court is left with the "definite and firm conviction that a mistake has been made." *Smith v Smith*, 278 Mich App 198, 204; 748 NW2d 258 (2008).

A valid default establishes the defaulting party's liability as to all well-pleaded allegations. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000). "The entry of a default does not operate as an admission that the complaint states a cause of action. If the complaint fails to state a cause of action, it will not support a judgment." *State ex rel Saginaw Prosecuting Atty v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981); see, also, *Smak v Gwozdik*, 293 Mich 185, 188-189; 291 NW 270 (1940). Further, conclusions of law unsupported by sufficient factual allegations are not deemed admitted by a defaulting party. *Cogswell v Kells*, 293 Mich 541, 545; 292 NW 483 (1940); *Bonnici v Kindsvater*, 275 Mich 304, 309-310; 266 NW 360 (1936). Although well-pleaded allegations established by default preclude the defaulting party from litigating issues of liability, the default judgment is not an admission regarding damages. *Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Mich*, 119 Mich App 671, 675; 326 NW2d 599 (1982). Damages must be proved with reasonable certainty by the party asserting the claim. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 634; 769 NW2d 911 (2009). Accordingly, damages that are based on speculation or conjecture are not recoverable. *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010).

Here, the trial court concluded that plaintiffs stated a cause of action against defendant for both legal malpractice and "intentional interference with an inheritance." Thus, we first turn to the second amended complaint. In Count I, plaintiffs asserted a legal malpractice claim. Legal malpractice is a claim against an attorney based on inadequate legal representation which resulted in damages to the plaintiff. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). The first element of such a claim is the defendant's duty to avoid negligent conduct which is established as a matter of law if an attorney-client relationship existed between the plaintiff and the defendant. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

Here, with regard to defendant's purported duty, plaintiffs alleged that defendant "was engaged to provide independent professional advice to Decedent with respect to the proposed transfer of the structured settlement." Thus, plaintiffs appear to have asserted that an attorney-client relationship existed between defendant and plaintiffs' decedent. See *Macomb Co Taxpayers Ass'n v L'Creuse Public Schools*, 455 Mich 1, 10-11; 564 NW2d 457 (1997). Plaintiffs did not assert that an attorney-client relationship existed between defendant and the decedent's estate, the decedent's minor children or their guardian and no factual allegations averred support such claims. It is clear that the decedent's estate was pursuing the decedent's legal malpractice claim against defendant on her behalf. Although we are not convinced that the decedent's estate had a right to pursue the decedent's legal malpractice claim against defendant,

for purposes of this case only, we will assume that the decedent's estate had such right. However, because plaintiffs have failed to plead that defendant had an attorney-client relationship with the decedent's minor children or their guardian, these plaintiffs have failed to state a legal malpractice cause of action against defendant. And any such conclusion of law set forth in their complaint that defendant owed them a duty is unsupported by sufficient factual allegations. Therefore, defendant is not deemed to have admitted that defendant had such attorney-client relationships and, accordingly, that he owed a duty to anyone other than to the decedent. See *Cogswell*, 293 Mich at 545. Thus, the trial court's findings of fact and conclusions of law to the contrary are clearly erroneous.

The second element of a legal malpractice claim is a breach of duty, otherwise stated as negligence in the representation of the client which occurs, for example, when an attorney fails to use reasonable skill, care, discretion, and judgment in representing a client. *Simko*, 448 Mich at 655. Here, in general, with regard to defendant's legal representation of the decedent, plaintiffs averred that defendant breached duties owed to her by engaging in the unauthorized practice of law in Michigan, failing to properly research Michigan law related to the Structured Settlement Funding Act, failing to render proper and sound legal advice, and representing the decedent while being paid by the other party to the transfer agreement, Settlement Funding, LLC. These allegations are admitted as a consequence of defendant's default because they pertain to his representation of the decedent. However, the additional allegations that defendant committed a fraud upon the court which approved the transfer agreement and that defendant breached his duty by depriving the decedent's minor children of their inheritance are not deemed admitted by defendant as a consequence of his default because the allegations do not pertain to duties owed to the decedent.

The third element of a legal malpractice claim is that a defendant's negligence was a proximate cause of an injury to his client. In that regard a plaintiff must prove that the defendant's actions were a cause in fact of the claimed injury by presenting "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994); see, also, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 218; 761 NW2d 293 (2008). And a plaintiff must also prove that the defendant's actions were the legal cause of the plaintiff's injuries which involves consideration of "whether the defendant should be legally responsible for the plaintiff's injury." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586 n 13; 513 NW2d 773 (1994). Legal cause "is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. It involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, and depends in part on foreseeability." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496-497; 668 NW2d 402 (2003) (citation omitted). The fourth element of a legal malpractice claim is the fact and extent of the injury alleged, i.e. damages. *Charles Reinhart Co*, 444 Mich at 585-586. With regard to damages in a legal malpractice action, the plaintiff is entitled to recover all damages that are a legal and natural consequence of the defendant's negligence. *Gore v Rains & Block*, 189 Mich App 729, 741; 473 NW2d 813 (1991).

Here, with regard to the elements of proximate cause and damages, plaintiffs generally averred that defendant's breach of his duties to the decedent caused (1) a fraud to be committed

upon the court, (2) the approval of the transfer agreement in contravention of state law and the legal rights of the minor children, (3) the estate to incur substantial damages “in estate administration expenses to correct the fraud committed upon the court,” (4) the estate to incur substantial damages “by being deprived of the annuity payments to pay Decedent’s child support obligation,” and (5) the decedent’s minor children to be deprived of an inheritance.

These averments, however, do not set forth any injury sustained by the decedent, defendant’s client, as a consequence of defendant’s alleged negligence. Plaintiffs have alleged that the court which approved the transfer agreement was injured by defendant’s conduct, that the decedent’s minor children were injured by defendant’s conduct, and that the estate was injured by defendant’s conduct—but they were not defendant’s clients and he owed no duty to them. Plaintiffs have failed to allege that defendant’s actions were the cause in fact and legal cause of any injury to the decedent as a consequence of defendant’s breach of his duties owed to the decedent. Only the decedent had an attorney-client relationship with defendant and, thus, only injuries that she sustained as a consequence of defendant’s breach of his duties to her are actionable injuries. To the extent that the decedent’s estate may have alleged that defendant’s actions were a cause in fact and legal cause of a financial injury sustained by the decedent, we disagree. The decedent agreed to the terms of the transfer agreement and received the compensation set forth in that agreement. That transfer agreement was the subject of an extensive court hearing, after which the trial court approved the transfer agreement with conditions that were fulfilled, including the payment of child support obligations. The decedent did not challenge that 2003 court order before her death in 2005 and it may not be collaterally attacked through this legal malpractice action asserted by decedent’s estate. “The decision of a court having jurisdiction is final when not appealed and cannot be collaterally attacked.” *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987). Thus, plaintiffs have failed to state a legal malpractice cause of action against defendant and the trial court’s findings of fact and conclusion of law to the contrary were clearly erroneous. Accordingly, the trial court’s judgment awarding damages on plaintiffs’ legal malpractice claim against defendant is reversed.

Next, we consider Count II of plaintiffs’ complaint, a claim of “intentional interference with inheritance.” Defendant argues that this purported tort claim is a not a recognized cause of action. We agree.

The decedent died on April 15, 2005. Plaintiffs filed their original complaint on December 14, 2007, and their second amended complaint on March 5, 2008. In asserting this claim, plaintiffs apparently relied on this Court’s holding in the case of *In re Green*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 1996 (Docket No. 173335)—a case that is not binding precedent. See MCR 7.215(C)(1). However, subsequent to the decision in that case, in 2004—well before the decedent died or this lawsuit was filed—this Court considered and rejected the *In re Green* decision, holding that “judicial restraint causes us to refrain from specifically recognizing this tort [of an intentional interference with an expected inheritance] until the Michigan Legislature codifies this tort, or upon appropriate judicial review and expression of our Supreme Court.” *Dickshott v Angelocci*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 241722), slip op at 17. Our Supreme Court denied leave to appeal that decision. *Dickshott v Angelocci*, 474 Mich 911; 705 NW2d 351 (2005). Further, in 2009, this Court again considered the issue whether a cause of action for

“intentional interference with a right of inheritance” exists and held that no published case law or statutory provision supported such a claim. *Charfoos v Schultz*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2009 (Docket No. 283155), slip op at 5. The *Charfoos* court concluded: “Michigan courts have not yet recognized intentional interference with an expected inheritance as a valid cause of action in this state.” *Id.* Thus, contrary to the trial court’s holding, it is clear that the alleged tort of “intentional interference with an inheritance” is not a recognized cause of action in Michigan; there is no published case law or statutory provision that supports such a claim. Because plaintiffs failed to state a cognizable cause of action, defendant was not liable on the claim as a consequence of the entry of a default. Accordingly, the trial court’s findings of fact and conclusions of law to the contrary with regard to the “intentional interference with inheritance” claim asserted against defendant are clearly erroneous and the judgment awarding plaintiffs damages on this claim is reversed.

In summary, the trial court properly denied defendant’s motion to set aside the default judgment, but the trial court’s award of damages to plaintiffs on both claims must be reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood